United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2007

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM BREWINGTON Appellant, -against- UNITED STATES OF AMERICA, Appellee.	:	Docket No. 75-2007

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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The following brief is submitted in reply to the arguments made by the appellee in its brief to this Court in this case.

A. The failure of the District Court to establish on the record that Mr. Brewington was aware of the "maximum penalties," in the context of special parole, to which he was subjecting himself by pleading guilty, requires vacature of Mr. Brewington's plea.

The Government, in its brief to this Court states:

> Concededly, the portion of the pleading minutes relating to appellant's plea are devoid of any reference to the mandatory special parole term which was imposed upon him at the time of sentencing. Although the Government submits, there is ample evidence to support an inference that appellant actually knew the nature of the special parole term when he offered his plea, the special parole term was clearly not the subject of comment or inquiry on the record after the taking of Eddie Long's plea.

(Id. at 5)

Not only does the record fail to establish that Mr. Brewington was aware of the mandatory three year term of special parole which the judge had to impose, but the Court also failed to establish whether Mr. Brewington was aware that the special parole provision empowered the judge to impose a much longer parole term, indeed up to a life sentence of such supervision, and that violation of special parole could result in re-incarceration for up to the full length of the special parole imposed. In fact, the Court did not even establish that Mr. Brewington was aware of the 15 year maximum incarceration and $25,000 fine which could be imposed.

Rather, the only references to the penalties to which Mr. Brewington was subjecting himself by pleading guilty were the Government's recommendation that he be sentenced to "six years" (hearing transcript at 15) and the Court's statement that it was not bound by the Government's recommendation but could give any sentence "within the limits of the statute." (hearing minutes at 17-18).

Mr. Brewington was subsequently given a sentence of sixteen years which included six years of incarceration and a special parole term of 10 years. Thus, Mr. Brewington was not advised of the maximum penalties to which he was subjecting himself by pleading guilty, and was eventually given a sentence ten years in excess of six years, the only penalty the record establishes Mr. Brewington was actually aware of.

In 1971, this Court, drawing from Rule 11,*

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* Rule 11 requires that:

> . . . the court . . . shall not accept [a guilty plea] . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.
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> (emphasis added)

McCarthy v. United States, 394 U.S. 459 (1969),* and the decision of several other circuits (see e.g. Marvel v. United States, 380 U.S. 262 (1965); Tucker v. United States, 409 F.2d 1291, 1295 (5th Cir. 1969)) held in Jones v. United States, 440 F.2d 466 (2d Cir. 1971) that

> . . . the maximum possible sentence is a 'consequence' within the meaning of Rule 11 and that a guilty plea cannot be accepted under that rule unless the Court determines that the defendant is aware of the maximum penalty for the offense.
>
> (Id at 468, emphasis added).

Moreover, the Court in Jones held that a pleading defendant's awareness of the "maximum penalty" to which he was subjecting himself was such a basic "consequence" under Rule 11 that the District Court's obligation to establish on the record that the defendant was aware of this "consequence" was apparent from the McCarthy decision itself. Consequently, the Court in Jones held that the failure of a District Court judge to ascertain that a pleading defendant was aware of the "maximum penalty" in any plea proceeding occurring after the 1969 McCarthy decision would "require automatic

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* In 1969, the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969), established what is frequently referred to as the "per se" rule, holding that the failure of the district court to comply fully with Rule 11 automatically requires that the guilty plea be set aside and the defendant be permitted to plead anew.

vacature of the plea." Jones v. United States, supra, 440 F.2d at 468.

Special parole, which at a minimum would have extended Mr. Brewington's sentence by three years, and in fact extended it by 10 years, was clearly a component of his "maximum penalty." Consequently, the district judge's failure to establish on the record that Mr. Brewington was aware of these and the other penalties to which he was subjecting himself by pleading guilty, requires vacature of his pleas under Rule 11, McCarthy, and Jones.

B. The fact that the district judge advised Mr. Brewington's co-defendant of mandatory minimum special parole does not render Mr. Brewington's plea valid under Rule 11.

The Government, although conceding that the District Court did not address Mr. Brewington at all concerning special parole, argues that the fact that the District Court did advise Mr. Brewington's co-defendant of the mandatory minimum special parole term was sufficient to satisfy Rule 11 as to Mr. Brewington's plea. This argument is invalid first because it is based on the premise, for which the Government offers no factual support, that Mr. Brewington was in fact attentive to the colloquy between the judge and his co-defendant. It is precisely this sort of post-plea proceeding surmise

which was expressly condemned and rejected by the Supreme Court in McCarthy, supra,394 U.S. at 468-472. Rather, Rule 11, the Supreme Court, and this Circuit have all made clear that a defendant's awareness of a "consequence" of his plea must be "established through personal questioning by the trial judge" (Irizarry v. United States, slip op 899, 905 n.2; (2d Cir. Docket No.74-1866, December 19, 1974); Manley v. United States, 432 F.2d 1241, 1244 (2d Cir. en banc 1970), and that such questioning must take place on "the record at the time the plea is entered." McCarthy v. United States, supra, 394 U.S. at 470 (emphasis in the original); Irizarry v. United States, supra, slip op. at 905; see also Santobello v. New York, 404 U.S. 257, 261 (1971); Manley v. United States, supra, 432 F.2d at 1244. This case, failing those obligations, requires automatic vacature of the guilty pleas. McCarthy v. United States, supra; Irizarry v. United States, supra.

Moreover, even assuming arguendo that Mr. Brewington overheard the advice given his co-defendant as to maximum penalties, that fact would not establish that he was aware of the meaning of the special parole term or its applicability to his plea. The Courts, in applying Rule 11, have held that a two step procedure must be followed to establish that a pleading defendant is aware of the consequences of his plea:

(1) the judge should on the record advise the defendant of each consequence and (2) the judge should then determine through questioning the defendant that he understands that consequence. Thus, this Court, in Michel v. United States, supra, stated:

> . . . the defendant not only should be advised that [mandatory minimum special parole] will be imposed, but also should be asked by the court if he understands that fact.
>
> (Id. slip op. at 525).

See also McCarthy v. United States, supra; Irizarry v. United States, supra; United States v. Richardson, 484 F.2d 516 (8th Cir. 1973); Jones v. United States, supra; Bye v. United States, 435 F.2d 577 (2d Cir. 1970). In fact, this Court, in affirming Michel distinguished United States v. Richardson, supra, on precisely this ground. In Richardson, reference was made to the mandatory minimum special parole provision during Richardson's plea proceeding. This Court acknowledged that vacature of the plea was required in Richardson despite the reference to mandatory minimum special parole, because "no inquiry was made of the defendant by the court . . . as to whether or not he understood that the court had to impose a minimum special parole term of three years." Michel v. United States, supra, slip op. at 526-27, fn.2. Consequently, despite the advice given Mr. Brewington's co-defendant and the Government's suggestion that Mr. Brewington may have over-heard that advice, the court's failure to make inquiry of Mr. Brewington to establish that he understood that special parole was one of the

penalties to which he was subjecting himself, requires vacature of his plea. Michel v. United States, supra; United States v. Richardson, supra.*

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* Moreover, even if the District Court had ascertained Mr. Brewington's awareness of the advice given his co-defendant, appellant submits that that advice was insufficient to satisfy Rule 11. Concerning special parole, the District Court only informed the co-defendant that he would be subject to

> a special parole term of at least 3 years, in addition, if a term of imprisonment is imposed.
>
> (Plea proceedings at 6)

The co-defendant was not told that the special parole provision empowered the judge to give the defendant up to a life-time of special parole supervision, violation of which could mean re-incarceration for up to the full term of the special parole imposed. Absent such additional advice, a pleading defendant could not be found to be aware that the special parole provision could greatly extend his period of supervision or incarceration, as Mr. Brewington's ten year special parole term dramatically demonstrates.

To the extent that this Court's decision in Michel is read to approve the sort of limited advice given Mr. Brewington's co-defendant, appellant respectfully submits that that case was erroneously decided. In order for a pleading defendant to be aware of the full scope of the special parole "consequence" of his plea, the district judge should advise him not merely of the mandatory minimum term, but also of the judge's discretion to impose a much longer term, indeed up to a life sentence of such supervision, and that violation of that special parole may mean re-incarceration for up to the full length of the special parole imposed. Only after such advice, can a defendant enter a guilty plea with full knowledge of the "maximum penalties" to which he is subjecting himself. Jones v. United States, supra.

C. The special parole provision was a "consequence" under Rule 11 at the time of Mr. Brewington's 1973 plea proceeding.

The Government alternatively argues that the District Court's conceded failure to discuss special parole with Mr. Brewington or to ascertain his awareness of this particular penalty does not require vacature of Mr. Brewington's guilty plea, since special parole was not a "consequence" under Rule 11 at the time of Mr. Brewington's plea proceeding.

This argument is based on the theory that the special parole provision did not become a "consequence" under Rule 11 until this Court noted that that particular penalty was a "consequence" in the recent case of Michel v. United States, slip op. 433 (2d Cir. Docket No. 74-2193, December 2, 1974). Thus, the Government, by attempting to analogize this case to Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971) and Bye v. United States, 435 F.2d 177 (2d Cir. 1970), reasons that the Court in Michel somehow established a new rule which this Court could now elect to apply only prospectively.

However, in Michel, this Court was not establishing a new rule. Rather, in noting that special

parole was a "consequence" under Rule 11, it was merely reiterating the established law of this Circuit, law which was in existence well in advance of Mr. Brewington's (or Michel's) plea proceedings.

Specifically, the District Court's obligation to establish on the record that Mr. Brewington was aware of the special parole provision has existed since this Court's decision in Jones v. United States, supra, a decision rendered well in advance of Mr. Brewington's plea proceeding. Special parole, constituting a sentencing requirement which may, and in this case did, greatly extend the penalty imposed on a defendant, is certainly a significant component of the "maximum penalty." Consequently, the District Court's failure to determine Mr. Brewington's awareness of this penalty requires vacature of his plea under the Jones decision alone.

Any doubt left by Jones that special parole is a "consequence" of which the pleading defendant must be aware evaporates when that case is read in conjunction with the very case on which the Government relies in this proceeding - Bye v. United States, supra. That case held that ineligibility for parole was a "consequence" under Rule 11. Mr. Brewington's plea proceeding, which occurred some three years after

the Bye decision, was subject to the prospective application of Bye. See United States v. Korenfeld, supra. It is inconceivable that any court, armed with the knowledge that both the "maximum penalty" (Jones v. United States, supra) and parole eligibility (Bye v. United States, supra) were "consequences" under Rule 11, could justifiably fail to comprehend that special parole was a "consequence" of which the defendant had to be made aware before his plea could be valid under Rule 11 and McCarthy. In fact, this Court, in noting that the special parole provisions were a "consequence" under Rule 11 in Michel v. United States, supra, did so for the express reason that "since special parole adds time to a regular sentence, it is within the Bye rationale." Michel v. United States, supra, slip op. at 525.

Both the Third and Eighth Circuits in cases identical to the present proceeding have concluded that when prior decisions, such as this Circuit's Bye decision, have established parole ineligibility as a "consequence" under Rule 11, a District Court's subsequent failure to advise a pleading defendant of special parole is a violation of Rule 11 requiring automatic vacature of the

guilty plea. In this regard, the Eighth Circuit's treatment of this issue is instructive. In Moody v. United States, 469 F.2d 705 (8th Cir. 1972), that Circuit's equivalent to this Circuit's Bye decision, that Court held that ineligibility for parole was a "consequence" under Rule 11. Subsequently, in United States v. Richardson, supra, that Circuit's equivalent of the present proceeding, the Court held that Moody required that Richardson should have been advised of the special parole provision before pleading, and that the District Court's failure to do so, and to ascertain that defendant understood its significance, required automatic vacature of the guilty plea:

> . . . This mandatory special parole term is unique in that it is in addition to and not in lieu of any other parole term provided by law. Therefore, the nature of this special parole term mandated by 21 d.S.C. §841(b)(1)(A), is a "consequence" of a guilty plea about which a defendant must be fully informed before acceptance of his guilty plea, and its application is governed by Moody v. United States, 469 F.2d 705 (8th Cir. 1972), holding that ineligibility for parole is a "consequence" of a guilty plea, and, therefore, a matter the court must determine is understood before a guilty plea may be accepted . . .
>
> This same rationale is equally applicable here; for a defendant does not plead with understanding of the consequences of his plea when he is unaware of the

nature of the mandatory special parole term that must be imposed upon a guilty plea if a sentence of imprisonment results.

. . . where the record is deficient in showing advice of and awareness of the maximum penalty, the judgment of conviction should be vacated and the defendant called upon to plead anew. Kotz v. United States, 353 F.2d 312(8th Cir. 1965). We agree with the Court in McCarthy that '[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the charge against him; McCarthy v. United States, 394 U.S. at 470 89 S. Ct. at 1173. Like reasoning applies to the consequences of a plea . . .

. . . here the special parole term is a type of restraint that is imposed in addition to the general sentence and takes effect only after the general sentence, including any parole therefrom, has been served. Further, a violation of the condition of the terms of the special parole can result in an enhanced sentence for the length of the special parole term, which in effect constitutes a second sentence.

Since the special parole term possesses ramifications differing from ordinary parole and since the provision of the special parole term are of recent origin, being enacted in October 1970, additional care should have been taken to make sure that the defendant understood this facet of the consequences of his guilty plea.

. . . As we are convinced that the record does not adequately demonstrate that Richardson understood the consequences of his guilty plea, the judgment of the District Court is reversed and the case is remarded with directions to vacate the conviction and allow defendant to plead anew to the charges. McCarthy

See also Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974).

That Judge Judd himself was aware at the time of Mr. Brewington's plea proceeding that the special parole provision was a "consequence" under Rule 11 is established by the fact that earlier that same day, he acknowledged his obligation to make one of Mr. Brewington's co-defendants aware of that provision. Consequently, Jones and Bye are dispositive of this case, and Mr. Brewington must be permitted to plead anew.

D. Assuming arguendo that this Court regards Michel as a case of first impression, it must be applied retrospectively at least to require the granting of Mr. Brewington's 2255 application.

The Government argues that Michel like Bye establishes a new rule, and that the question of whether to apply it retroactively should therefore be determined by the three-pronged test of Halliday v. United States, 394 U.S. 831 (1969) and Korenfeld v. United States, supra. However, application of that test has been espressly limited to cases "that depart from precedent." Halliday v. United States, supra, 394 U.S. at 832; Linkletter v. Walker, 381 U.S. 618, 622-629 (1965); see also Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966);

Korenfeld v. United States, supra. Absent such a departure from precedent, decisions are to be applied retroactively under the "general principle of retroactivity" established in common law and in the decisions of the Supreme Court. Robinson v. Neil, 409 U.S. 505, 507-8 (1973); See also Norton v. Shelbey County, 118 U.S. 425, 442 (1886).

In Korenfeld, this Court found that prior to Bye, the law of this Circuit, as articulated in United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y. 1967), aff'd sub nom. United States v. Mauro, 399 F.2d 158 (2d Cir. 1968), cert. denied, 394 U.S. 904 (1969), was that ineligibility for parole was not a "consequence" under Rule 11 and McCarthy. Thus, Bye was a departure from precedent susceptable to the three-pronged test of Halliday.

Michel to the contrary, did not over-rule any prior decisions of this or any other Circuit. Rather, it followed this Court's prior decisions in Jones and Bye. Since Michel did not "depart from precedent," it is therefore subject to the "general principle of retroactivity." Robinson v. Neil, supra, 409 U.S. at 507-8.

Assuming arguendo that this Court should decide, that the three-pronged test of Halliday is applicable, evaluation of those criteria* mandates Michel's retroactive application. First, the purpose of the rule - to require a District Court to inform a pleading defendant of special parole provisions - is of considerably greater significance than requiring it to inform the defendant of parole ineligibility under Bye. A defendant who pleads guilty under the mistaken impression that he will be eligible for parole, is at least made aware of the maximum penalty to which he is subjecting himself by his plea. Since parole is discretionary, such a defendant, while hopeful of early parole release, is also aware that such parole may be denied and he may be required to serve the maximum penalty for the crime to which he pleads. He is also aware that he cannot be required to serve more than that maximum panelty. A defendant who is not informed of the special parole provision, on the other hand, pleads under the mistaken impression that he is subjecting himself to a

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* (1) The purpose of the new rule (2) the extent of reliance upon the old rule, and (3) the effect that retoractive application would have upon the administration of justice.

specifically limited penalty whereas in fact, the possible duration of the penalty is unlimited, and could result in non-incarcerated supervision or, in the case of parole violation, incarceration, for any period up to the rest of his life. Clearly, making sure that a pleading defendant is advised of this liability is much more significant than advising him that he is subject to a specified maximum penalty but that he will not be eligible for parole. Given this distinction, a court's failure to advise concerning special parole would clearly have a much greater impact on the voluntarineww of the defendant's guilty plea.

The second Halliday factor - the extent of reliance upon the old rule - likewise militates in favor of the retroactive application of Michel. As previously noted, in Korenfeld v. United States, supra, 451 F.2d at 773-4, this Court denied retroactive application to Bye because prior to Bye judges in this Circuit relied on the law of the Circuit as expressed in Caruso v. United States, supra, which was that parole ineligibility was not a "consequence" under Rule 11. (Korenfeld v. United States, supra, 451 F.2d at 773-4).

Thus, the Korenfeld court found heavy reliance on the pre-Bye rule.

However, as previously noted, Michel did not overrule any prior law of this or any other circuit. Moreover, in light of this Circuit's holding the "maximum penalty" (Jones v. United States, supra) and parole ineligibility (Bye v. United States, supra) were "consequences" under Rule 11, it is difficult to conceive how any sentencing judge could have believed that special parole provision, with its potential for greatly extending the period of punishment to which a pleading defendant subjected himself, was not a "consequence" under Rule 11.* As Judge Friendly explained in Travers, when a case (like Michel) presents "no thunderclap like those that have given rise to Supreme Court rulings limiting the temporal effect of constitutional decisions on criminal procedure. . . [and it] blazed no new trails . . . " it should be applied retroactively. United States v. Travers, slip op. 805, 810 (2d Cir. Docket No. 74-1737, December 16, 1974). Moreover, the Government has provided no information which would establish

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* A sentencing judge, on his own evaluation, might reasonably conclude that parole eligibility, being discretionary and having the possible impact only of lessening, but not increasing the maximum possible penalty, was not a significant "consequence" of which a pleading defendant must be advised. Korenfeld v. United States, supra, 451 F.2d at 774. For the reasons expressed in the text, a similar conclusion concerning special parole would be irrational.

It is also relevant to note that the special parole provisions first went into effect in October, 1970, after the revision of Rule 11, and the McCarthy and Bye decisions and only a few months before the Jones decision. Consequently, this was not a situation where the district judges, prior to those decisions, had established an informal practice of not advising as to special parole.

that prior to Michel District Courts generally failed to advise pleading defendants of the mandatory minimum special parole provisions. To the contrary, such advice was even given by Judge Judd himself in the case of Mr. Brewington's co-defendant. His oversight in failing to give that advice to Mr. Brewington certainly does not establish that District Courts prior to Michel were relying on any belief that such advice was not one of the "consequences" under Rule 11.*

Finally the effect that retroactive application of Michel would have on the administration of justice - the third Halliday factor - would appear to be negligible. Since there was no contrary rule, there are, in all likelihood, very few cases in which district judges would have failed to advise pleading defendants of so significant a sentencing consequence as the open-ended special parole provisions. In those few cases, §2255 applications accompanied by the transcript of plea proceedings, could be decided on their papers, without the necessity of a hearing, since McCarthy requires that the defendant's

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* The Government, to date, has identified only three cases in which a district judge failed to advise a pleading defendant of his liability to special parole: this case; Ferguson v. United States, 74-2569; and Negron v. United States, 75 Civ. 138 (E.D.N.Y.). Although our office is not familiar with the Negron case, we did represent Mr. Ferguson. In Ferguson as in this case, the fact that the judge's failure to advise as to special parole was not an established practice is evidenced by the fact that the district judge acknowledged his obligation to advise a co-defendant of special parole.

awareness of such "consequences" be established "on the record" and that failure to do so requires automatic vacature of the guilty plea. Thus, it is clear that the three Halliday criteria require that in this proceeding, unlike in Korenfeld, the Michel decision be applied retroactively to invalidate Mr. Brewington's guilty pleas.

Moreover, the retroactivity of Michel is important to the principal goals of Rule 11, McCarthy and Irizarry, infra. Given the significance of guilty pleas, both as a waiver of substantial rights, and as a presently indispensible means of disposing of cases and administering justice, Rule 11 and the cases interpreting it have strongly stressed that the pleading defendant know exactly what he is doing by pleading guilty and that this understanding be clearly established on the record. The burden placed on the District Court is to insure that the defendant is aware of any and all possible penalties to which he is subjecting himself by his plea. To hold that every minor clarification of Rule 11, even when that clarification is clearly forseeable from prior decisions (here, Jones and Bye), is not a "consequence" of which a pleading defendant must be advised until this Court specifically identifies it as such, will adversely affect the procedures calculated to advise fully the pleading defendant, thereby defeating the goals of Rule 11

and increasing the number of guilty pleas on less than adequate knowledge. This, in turn (as discussed in McCarthy) will increase the number of applications to set aside pleas as not having been knowingly and voluntarily made.

Finally, even if full retroactivity is denied to Michel under the Halliday test, Michel should still be given limited retroactive application to cases, such as the present proceeding, which were on appeal to this Court at the time of the Michel decision. It would be fundamentally unfair to deny Mr. Brewington the application of the rule applied in Michel merely because Michel, rather than Brewington was decided first by this Circuit. See United States v. Travers, supra, slip op. at 811; Desist v. United States, 394 U.S. 244, 255-56 (1969) (Douglas, J. dissenting); id. at 256 et seq. (Harlan, J. dissenting).

CONCLUSION

FOR THE ABOVE STATED REASONS AND THE REASONS SET FORTH IN APPELLANT'S BRIEF, MR. BREWINGTON'S GUILTY PLEA SHOULD BE VACATED AND HE SHOULD BE PERMITTED TO PLEAD ANEW.

Respectfully submitted,

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April 4, 1975

CERTIFICATE OF SERVICE

April 4, 1975

I certify that a copy of this reply brief ~~and appendix~~ has been ~~mailed to~~ served on the United States Attorney for the Eastern District of New York.

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